

LEGAL UPDATE

Revised December 2011

Course Objectives



- Legislative Changes
- Hot Topics
- Case Studies

Legislative Changes in 2011



Changes in Real Estate License Act

- ❑ Education
- ❑ Experience Requirements
- ❑ Broker Responsibility
- ❑ Exams
- ❑ Accountability
- ❑ Housekeeping Matters
- ❑ Self-Directed Funding



Educational Requirements for Salesperson License SB 747, HB 1637:

- Decreased number of core hours for salesperson applicant from 210 to 180 core hours.
- First renewal of salesperson's license increased from 60 to 90 core hours
- Total after 1st renewal remains at 270 hours.

Broker Experience Requirements

- Broker applicant needs
4 yrs experience in
last 5 years (up from 2
out of 3)

Broker Responsibility Course

- Brokers who sponsor salespersons or licensees who supervise others must take a 6-hour Mandatory Broker Responsibility course for license renewal.

Exams

- The benchmark requirement for first-time examination pass rate was changed to an average percentage of examinees who pass on 1st attempt (from 55%). TREC sets benchmark.
- Applicant has 1 year to satisfy exam requirement (up from 6 months).

Educational Programs



- Courses must meet the benchmark for each license category before its accreditation is renewed. TREC sets benchmark for each license category.
- TREC may deny accreditation if applicant owns or controls, or has owned or controlled a program that has been revoked.
- Disciplinary action against educational programs now follows same procedures as with other licensees and similar action can be taken.

Broker Accountability Measures

- A licensed business entity must obtain E&O insurance (at least \$1 million) if the D.O. owns less than 10 % of entity.
- Entity that receives compensation on behalf of a licensee must be licensed as a broker.
- Partnerships are no longer exempt from licensing requirements as a business entity.
- Entity that engages in brokerage and that is required to be registered to do business in Texas with the Secretary of State is required to be licensed as a broker.

Broker Accountability (cont.)

- Performing appraisals is no longer a brokerage activity. Clarification was made to distinguish between BPOs and appraisals. Brokers may perform BPOs; not appraisals.
- Clarification added: he who controls collection or acceptance of rent from a SFR requires a license.
- Attorney exemption narrowed to include only Texas attorneys (not other states)

TREC Housekeeping

- ❑ TREC may now solicit and accept gifts, grants, and donations for operations.
- ❑ Applicants and licensees must provide TREC current address, phone, & email (and keep updated).
- ❑ Maximum time in for licensee to renew late with only monetary penalty was decreased from 1 year to 6 months (1.5 times for 0-90 days; 2 times for 90-180 days);
- ❑ Fingerprinting and background checks are required for R-O-W certificate applications.

Business Entities

- Licensed business entity must designate a broker (D.O.). If D.O. owns less than 10%, then entity must obtain E&O insurance (at least \$1 million).

Self-Directed, Semi-Independent (SDSI) Agency

- TREC & TALCB are now SDSI (Self-Directed, Semi-Independent).
- TALCB remains independent subdivision of TREC.
- Licensees will notice little changes that affect them.
- Allows agencies to adopt their own budgets (expenses and revenues), subject to legislative review.
- Will continue with:
 - ▣ representation by AG
 - ▣ SOAH Hearings
 - ▣ State audits
 - ▣ Restrictions on contracts, real property, facilities, etc.
- Must pay annual General Revenue fee of \$750,000.
- TREC relocated offices in July of 2011.

Appraisal Management Companies

- Appraisal management companies (AMC) must report the fees charged for appraisals.
- Compensation to appraisers must be reasonable & paid w/i 60 days.
- AMC must verify that appraisers satisfy USPAP competency rule.
- AMC must give appraiser the reason for removing the appraiser from a panel and allow him to respond in writing.

Tax Protests and SOAH

- The pilot program that allowed property owners to appeal ARB rulings (alternatively) to SOAH was expanded by HB 2203 to some additional counties.
- HB 1887 is a procedural bill related to property tax protests in an effort to clarify procedure in an attempt make process more efficient and effective. Licensee who work property tax protests may need to become familiar with changes.

Seller's Disclosure Notice



- Seller Disclosure Notice now has question about a “single blockable main drain in pool or hot tub”
- Notice now has disclosure if liquid propane gas is present
- Notice now has questions about rainwater harvesting system

Landlord Tenant/ Property Mgmt.



Certificate of Occupancy



If Landlord loses certificate of occupancy, the tenant has remedies for his actual damages (HB 1862)

Pauper's Affidavit

- If tenant fails to pay the initial rent deposit into the court registry in Pauper Affidavit then JP is to issue, immediately, a writ of possession. Pauper has 5 days to make deposit.

Smoke Alarms and Fire Extinguishers

- HB 1168 requires updates landlord-tenant section dealing with smoke detectors; now known as smoke alarms.
- At least 1 smoke alarm must be in each bedroom.
- In addition, there must be a smoke alarm in the hallway in the immediate vicinity of the bedrooms.

Smoke Alarms and Fire Extinguishers (cont.)

- If the unit has multiple levels, there must be a smoke alarm on each level.
- Can be battery operated if used as a residence before September 1, 2011 and if they comply with local codes.
- For properties built after September 1, 2011, local ordinances may impose stricter requirements.
- Can alternatively comply by meeting local codes with stricter requirements.

Smoke Alarms and Fire Extinguishers

- If 1A10BC fire extinguisher is installed (may be required by a local code), the landlord must inspect it at the beginning of the lease and when requested by tenant.
- Landlord must repair a nonfunctioning fire extinguisher (lacks correct pressure as recommended by the manufacturer).

Deceptive Trade Practices Act



- ❑ Real estate brokerage listed as a specific exemption in DTPA, however, brokers can still be liable under DTPA if broker:
 - ❑ Commits unconscionable act;
 - ❑ Misrepresents a material fact; or
 - ❑ Fails to make a material disclosure with intention of inducing a consumer into a transaction.

Title Insurance Companies and MCE

- Title companies are not prohibited from
 - ▣ engaging in promotional and educational activities that are not conditioned on the referral of business, or
 - ▣ providing MCE courses at market rates.

Groundwater Ownership

- Water Code was amended to clarify that groundwater below the surface is real property.
- Owner may drill for groundwater provided he does not cause waste or malicious drainage or subsidence.
- If property is in a water district, the owner must comply with rules of that district.

HOT TOPICS



Choice of Title Company

- “No seller ...shall require directly or INDIRECTLY, as a condition to selling the property, that title insurance covering the property be purchased BY THE BUYER from any particular title company.” (Sec. 9, RESPA)
- Brokers should avoid inserting their own preference.
- Interest may be prompted by new HUD-1 accounting

Residential Real Property Affidavit (T-47)

- Paragraph 6C(1) of TREC forms provides seller is to deliver existing affidavit AND T-47 affidavit.
- Important to deliver both at same time.
- Use of existing survey may have some limitations.
- May be prudent for buyer to purchase boundary deletion.

HOAs - Form 36-6 Changes

- The Addendum for Property Subject to Mandatory Membership in a Property Owners Association was amended to reflect statutory changes.
- To be proposed at TREC in Dec. 2011

HOAs - Notice of Membership in POA

- Notice about POAs in Paragraph 6 of the TREC contract forms was changed due to statutory changes.
- Tells parties they are entitled to receive copies of any documents about the subdivision.

HOAs - Fee Payments

- An HOA with more than 14 lots must adopt alternative payment plans (3 to 18 month pay outs)

HOA Foreclosures – Members of Military

- HOA may not foreclose on active military unless the provide a special notice about special right under Soldiers and Sailors Relief Act.

HOA Foreclosures – Assessment Lien

- HOA may not foreclose unless it first obtains an order for expedited foreclosure under the rules adopted by the Texas Supreme Court.
- Not required if owner agrees to waive the expedited foreclosure procedures.
- Waiver may not be required as a condition of the transfer of title.

HOA Foreclosures – Removal From Dedicatory Instrument

- HOAs power to foreclosure may be removed from or adopted into a dedicatory instrument if approved by at least 67% of all owners' votes.

HOA Foreclosures - Opportunity to Cure for Lienholders

- HOA may not use non-judicial foreclosure unless it provided notice of the total amount of the delinquency to any recorded, subordinate deed of trust holder and 60 days to cure.

HOA Records - Open



- ❑ HOA books must be reasonably available for examination and copying.
- ❑ HOA must adopt and record a records production and copying policy.
- ❑ HOA meetings must be open to owners.

HOA Meetings

- Executive sessions (closed to owners) are permissible only personnel, litigation, contract, enforcement, or confidential issues.
- Notice of HOA board meetings to all members is required at least 72 hours before the meeting.
- Votes must be in writing and signed by the member, but may be electronic.
- All owners may vote and run for the HOA board, notwithstanding dedicatory instruments that limit such rights.

HOA Websites



- Any HOA website must contain all recorded dedicatory instruments.

HOA Restrictions - Flags

- Flags of the USA, the State of Texas, or any branch of the armed forces may not be prohibited (but may be reasonably regulated).

HOA Restrictions – Roof Solar Panels

- A solar energy device may not be prohibited unless it threatens the public health or safety or violates a federal or state law, but it may be reasonably regulated.

HOA Restrictions – Religious Symbols

- A religious symbol display may not be prohibited, but it may be reasonably regulated.

HOA Restrictions – Speed Feedback

- An HOA may install a speed feedback sign.

Private Transfer Fees



- ❑ Private transfer fee created after September 1, 2011, is not binding or enforceable.
- ❑ Recipient of private transfer fee created before September 1, 2011, must file a “Notice of Private Transfer Fee Obligation” to continue collecting it and re-filed every 3 years.
- ❑ Disclosure of a transfer fee is required in the contract for sale.

Changes in TREC Contract Form

- ❑ 6B – Termination right moved from 15 (if commitment and exception documents not delivered in time req'd, then buyer may terminate)
- ❑ 6D – Clarification of Waiver Rights of Commitment (states that Schedule C requirements not waived “by Buyer”)
- ❑ 6E(2) – HOA Disclosures added
- ❑ 6E(8) – New Disclosure required (Priv. Transfer Fee)
- ❑ 7A – Seller required to keep utilities on
- ❑ 7E – Removes archaic language concerning repairs (previously allowed buyer to complete repairs)
- ❑ 15 – Streamlined – extension rights moved to other paragraphs

Joint Tenancy

Holmes v. Beatty, (Tex. 2009)

- Not a real property case; limited application to real property.
- Reaffirmed right to partition community property and, by agreement, make it separate property.
- Case allowed the creation of joint tenancy with right of survivorship by simple agreement including designations on bank or investment accounts
- **Subsequently, legislation overturned the case (SB 1198)**

Mortgage Originators



- HB 10 passed to comply with the Federal SAFE Act.
- Loan originators still regulated by their respective state agencies but are also registered in the Nationwide Mortgage Licensing System.
- Loan originator is a person who, for compensation, takes a loan application or offers or negotiates the terms of a loan.

Mortgage Originators (cont.)

- Def'n of loan originator does not include one who:
 - ▣ performs only clerical tasks for originator,
 - ▣ performs only real estate brokerage activities (unless compensated by a lender), or
 - ▣ is involved solely in providing extensions of credit related to timeshare plans.

Mortgage Originators (cont.)

□ Exemptions

- originator for a depository institution,
- residential mortgage for an immediate family member,
- attorney who negotiates the terms of a residential mortgage loan on behalf of a client,
- exclusive agent of registered financial services company,
- a person who seller-finances his own residence, and
- a non-profit organization providing self-help housing that originates zero interest residential loans.

Mortgage Originators (cont.)

- Definition picks up private investors who provide their own financing but deminimus rule applies in Texas (5 or less per year)
- Originators must complete education requirements and meet surety bond requirements.
- The originator's identifier is to be on each loan application form, solicitation, advertisement, and other documents.

Executory Contracts, Contracts for Deed, & Lease-Purchase Agreements

- Executory contracts defined in Chapter 5 of Property Code.
- Commonly known as Contracts for Deed or Contracts for Sale
- Elements:
 - ▣ Residence
 - ▣ Closing extends past 180 days
 - ▣ Possession
 - ▣ Consideration
- Lease-purchases and lease with options to buy are executory contracts
- Strict compliance with statutory provisions is required (penalties significant)
- Don't use standard forms to create lease-purchase or lease-option contracts.
- Do not attempt to write a lease-option clause into a standard residential lease agreement.

Schultz v. Taylor

(10-08-00077-CV 10th Court of Appeals)

- ❑ Used Lease Form to create lease-purchase
- ❑ Buyer did not buy and wanted deposit back
- ❑ Seller argued deposit was non-refundable
- ❑ Tenant prevailed
- ❑ Illustrates poorly drafted clauses in standard form can create controversy

Fair Credit Reporting Act



- ❑ The 2010 Dodd-Frank Wall Street Reform Act amended the Fair Credit Reporting Act (FCRA).
- ❑ Landlords already were required to provide applicants with notice of any adverse action based on the consumer report.
- ❑ If adverse action is based on the credit score, the landlord must disclose the credit score.

Fair Credit Reporting Act (cont.)

- Property manager may also need to disclose the following about the credit score:
 - ▣ range of possible credit scores under model used;
 - ▣ top 4 key factors that adversely affect the score or top 5, if number of inquiries is used;
 - ▣ date credit score was created, and
 - ▣ name of entity that provided the credit score.
- (May have to check with entity that provides score or model).

Fair Credit Reporting Act (cont.)

- If using other information in the consumer report but not the credit score to base the decision, then disclosure provisions are not applicable.

HUD Interpretive Rule on RSC and Disclosure Form

- Payment from RSC to broker are presumed to violate RESPA.
- RSC may compensate a broker for services when:
 - ▣ services are actual, necessary, and distinct from the primary services, and
 - ▣ when those additional services are not nominal and are not services for which there is a duplicative charge.

HUD Interpretive Rule on RSC and Disclosure Form

- Example of permissible payments for:
 - ▣ conducting annual inspections of items covered by RSC, and
 - ▣ recording serial numbers of items to be covered.
- Should have contract in place between broker and RSC
- Amount of compensation must be reasonably related to the value of those services & may be compensation for referrals of business.

Busby v. JRHBW Realty, Inc.

(No. 2:04-CV-2799-VEH (N.D. Ala. Apr. 20, 2009))

- Use of Transaction Fees or Administrative Fees in listings or representation agreements may violate RESPA
- Class Action against broker for using transaction fees which held was duplicative of fees paid for representation

CASE STUDIES



Boehl v. Boley

(Tex. App. –Amarillo, 2011)

- Involves allegation of failure to disclose known defect and misrepresentation about defect
- Plaintiff is required to prove actual knowledge of the defect on the part of the defendant
- Broker and Seller prevailed in defense
- Broker and Seller entitled to their attorney fees under the TREC forms

Joseph v. James

(Tex. App. –Austin, 2009)

- Involves allegations stemming from typical negotiations
 - Initiated on paper, but secondary counter-offers were not initialed or signed
- Brokers cannot bind principals (Special Agents)
- Held that the no contract had been created under the facts – did not comply with statute of frauds

Italian Cowboy Partners v. Prudential

(Tex. Sup. Ct. 2011)

- Reverses holding of Ct. of Appeals as reported in 2007 Legal Update Course
- Merger clause in commercial lease did not eliminate reliance on property manager's oral representations about the condition of the premises

Williams v. Dardennes

Houston (1st Dist.) 2011

- Buyer received some but not all documents related to inspections
- Court held that information in undisclosed document was duplicated in other documents buyer received
- Trial court held for buyer and denied Motion for JNOV, Appellate Court reversed on JNOV

Nguyen vs. Chapa

Houston [14th Dist.] 2009

- Seller sold property to 2 buyers (13 months apart)
- 2nd buyer won race to courthouse to record
- 2nd buyer and his lender did not have constructive or actual knowledge of 1st buyer
- 2nd buyer and his lender did not have notice that required them to make reasonable inquiry

Neary v. Mikob Properties

(Tex. App. -Dallas) 2011

- ❑ Broker sued for commission
- ❑ Broker could not produce a written commission agreement or document signed by defendant agreeing to pay fee
- ❑ Broker's corporate entity did not have a license
- ❑ Term Sheet combined with e-mails was not a sufficient writing to enforce a commission

Smith-Gilbard v. Perry

Court of Appeals of Texas, Dallas

- Seller signed agreement and closed
- Seller later learned that contract and deed identified more of her property than she wanted to sell
- Trial court held for seller on basis of a mutual mistake. Court of appeals reversed.

Sheehan v. Adams

Court of Appeals, Dallas

- ❑ Foundation defect case
- ❑ Buyer sued seller for failure to disclose & misrepresentation
- ❑ Jury finds for buyer. Trial Court granted JNOV for sellers and broker.
- ❑ Seller Disclosure Notice is not a Representation of Condition
- ❑ Buyer did not prove seller or broker actually knew of defect.
- ❑ Broker and seller were entitled to their attorney fees

Lesieur v. Fryar

Court of Appeals of Texas San Antonio

- Buyer alleged seller gave some information, but not all, information related to the foundation
- Court's side-by-side analysis of information given and not given showed information was duplicative
- Trial Court found for broker and seller and awarded their attorney fees.
- Appellate court affirms but reversed on the attorney's fees (disagrees with other cases on attorney's fees)

C.W.100 Louis Henna, Ltd. v. El Chico

(Tex. App.-Austin 2009)

- Case discusses definition of “trade fixtures”
- Analysis of definitions in lease held that trade fixtures belonged to tenant & trade fixtures in this lease included HVAC units
- Trial Court awarded summary judgment to tenant and appellate court affirmed.

Franco v. Lopez

(Tex. App.-Dallas 2010)

- Contract negotiated in way that Effective Date was later than the Closing Date
- Court held that enforceable contract nonetheless existed because of language permitting closing to be “or 7 days after objections have been cured or waived”
- Trial Court awarded specific performance to buyer. Appellate court affirmed

Mushtaha v. Kidd

(Tex. App.- Hou[1st Dist.] 2010)

- Broker's initials on a counter offer did not satisfy statute of frauds to make the contract enforceable against the seller
- Broker is a special agent; and broker cannot bind principal (generally)

The End

